



## NEPA Compliance for Corps permit decisions under sections 10/404/408 for the Bay Delta Conservation Plan

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### Background

The Bay Delta Conservation Plan (BDCP) is a Habitat Conservation Plan (HCP) being developed to promote the recovery of endangered, threatened and sensitive fish and wildlife species and their habitats in the Sacramento-San Joaquin Delta in a way that will also restore water exports to amounts at or above those prior to the collapse of Delta fisheries. BDCP is a program that was reformulated from a previous project called the "Peripheral Canal" that was solely intended for water supply. The BDCP is being lead by the California Department of Water Resources (DWR), Bureau of Reclamation, and south of Delta, State Water Contractors and Federal Water Contractors.

If approved by U.S. Fish and Wildlife Service and National Marine Fisheries, the BDCP would provide "Take" under Section 10 of the Endangered Species Act for the following actions:

- State Water Project (SWP) diversion and maintenance from the existing SWP points of diversion at Clifton Court Forebay and Barker Slough Pumping Plant
- SWP Operation and Maintenance of the Skinner Delta Fish Protective Facility and Banks Pumping Plant
- Construction, operation, and maintenance of a new SWP north of Delta intake facility and conveyance (pipeline or canal)
- Construction, operation, and maintenance of a new SWP North Bay Aqueduct intake facility and conveyance (pipeline or canal)
- Numerous habitat restoration actions to restore: 65,000 acres of freshwater and brackish tidal, subtidal, and transitional habitats; 20 linear miles of channel margin habitat; 5,000 acres of riparian habitat; 2,000 acres of grassland habitat; 400 acres of nontidal perennial emergent wetland and nontidal perennial aquatic habitat; up to 89 acres of vernal pool complex habitat; and 320 acres of managed seasonal wetland habitat
- Numerous physical and operational alterations to the Yolo Bypass to improve fish passage and enable 10,000 acres to be subject to an increased duration and frequency of inundation

An Environmental Impact Report/Environmental Impact Statement (EIR/EIS) is being prepared for the BDCP. The CEQA lead agency is DWR and the NEPA lead agencies, serving jointly, are the BOR, USFWS and NMFS. The Lead Agencies intend for the BDCP EIS/EIR to be a programmatic document for the entire BDCP Program and to provide project level detail for the construction of a new SWP north of Delta intake facility and conveyance (pipeline or canal), and the operations of the new intakes and the existing SWP and CVP facilities. The Corps agreed to be a cooperating agency on the EIS/EIR on November 24, 2008. As a cooperating agency, the Corps intends to use the EIS/EIR to the maximum extent possible to facilitate decision-making. At the program level, the Corps will recognize the BDCP EIS/EIR as a "Tier 1" document upon which later project-specific NEPA documents would recognize. Should the EIS-EIR including detailed information and analysis of the construction and operation of the intake facility and conveyance, the Corps would adopt the EIS/EIR and make a permit decision on that element of the BDCP, assuming the EIS/EIR addresses Corps concerns and program needs.

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The Corps has jurisdiction over BDCP-related actions under Section 404 of the Clean Water Act (CWA 404) and Sections 10 and 14 of the Rivers and Harbors Act of 1899 (RHA 10 and 14). Actions that involve a discharge of dredged or fill material in waters of the U.S. under CWA 404 and/or structures or work located in, on or over navigable waters under RHA 10 require a Department of the Army permit under the Corps Regulatory Program, which is administered by the District's Regulatory Division. For action that affect Federal projects, permission under RHA 14, also known as Section 408, is required. RHA 14 is administered by or processed through the District's Operations Branch depending on the type of action. Because the Corps jurisdiction and scope is not the entire BDCP program, the Corps will not make one permit decision on the BDCP as a whole. Many of the individual actions (parts of the whole) will however require Corps approval.

The first BDCP action DWR proposes to undertake is the construction of new water intakes, a new water conveyance pipeline or canal, and new operations of the State and Federal water projects. The Corps jurisdiction over this initial project of the BDCP is Section 10, 404 and 408. The schedule of BDCP permit process proposed by DWR is as follows:

- Mid-2013 - Completion of BDCP EIS/EIR
- Mid-2015 - Applications for the construction of water intakes, conveyance pipeline or canal, and new operations of the State and Federal water projects to Corps for 10/404/408
- Mid-2017 - Permit decisions for the construction of new water intakes, a new water conveyance pipeline or canal, and new operations of the State and Federal water projects from Corps

This proposed schedule is dependent on several factors, most of which are entirely out of control of the Corps. Sacramento District continues to meet, consult, coordinate, and cooperate with DWR and sister Federal agencies to ensure the parties understand the necessary requirements for permitting. At this point in time, Sacramento District feels that there is a very high risk that DWR and sister Federal agencies will not be able to meet this schedule due to public controversy and inability to obtain necessary technical data to support engineering and design.

As mentioned above, alterations and actions affecting waters and flood control are also being proposed in the Yolo Bypass. Those actions are currently not being raised by DWR or sister Federal agencies for coordination with the Corps. Schedule for these actions is unknown. However, it is foreseeable that the Corps would be reviewing and permitting actions in the Yolo Bypass concurrently with intake and conveyance actions.

## **NEPA Compliance Strategy Concept**

For project level compliance with NEPA, the BDCP EIS/EIR should meet the following requirements which support the Corps permitting actions:

- The alternatives analysis should be thorough enough to use for both the Corps public interest review and the 404(b)(1) guidelines. This means that the BDCP EIS/EIR should address all of the Corps public interest review factors including commercial and recreational boating. The BDCP EIS/EIR should also to explain the use and relevance of the 12 March and 3 May 2012 agreements on the overall purpose statement for the BDCP, and should ensure that the practicable alternative needed to comply with 404(b)(1) are merged into the reasonable range of alternatives addressed in the document.
- The BDCP EIS/EIR should describe the specific measures to avoid, minimize and mitigate

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impacts to waters of the U.S. The plan for mitigation should have specific information on the what, where, when and how the mitigation would be achieved.

- The BDCP EIS/EIR should demonstrate compliance with Executive Order 11988, and
- The BDCP EIS/EIR should disclose impacts to flood risk, including transfer of risk and residual risk, in the project area and throughout the flood system, both individually and cumulatively. Section 408: As with any document including project-specific coverage, the NEPA compliance document needs to adequately support the final design of the project.

### **Need for Additional NEPA Documentation**

At this time, and based on indications by DWR, we do not believe that the document will be adequate to support Section 408 permitting as it currently is based on ten percent designs which leaves a large margin for changes in design and impacts. As such, the need for additional NEPA documentation is anticipated, although this cannot be determined until at least until 65% designs have been reviewed.

### **Point of Contact**

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